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No. 80-1431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN THE MATTER OF R____ M. J____
Appellant

On Appeal from the Supreme Court of Missouri

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

1. Whether, consistent with the First Amendment, applied to the states through the Fourteenth, a state may adopt and enforce a court rule listing the exclusive categories of information which are permissible in lawyers' advertisements in the printed media, and forbidding use in advertising of matter not expressly authorized by the rule.

2. (a) Whether, consistent with the First and Fourteenth Amendments, a state supreme court may discipline a lawyer for including in advertisements the concededly accurate and non-misleading information that he is licensed to practice in two states, that he is admitted to practice before the Supreme Court of the United States, and that he practices in areas of law such as "personal injury," "contract," and "securities and bonds," which designations are not among those explicitly approved by the state authorities.

(b) Whether, consistent with the Commerce Clause, a state supreme court may discipline a lawyer for publishing, in a telephone directory which circulates in adjoining states, the truthful information that he is licensed to practice in both states.

3. Whether, consistent with the First and Fourteenth Amendments, a state supreme court may discipline a lawyer for mailing a simple announcement of the opening of his office to persons with whom he is not acquainted, on the basis of a court rule limiting the mailing of announcements to "lawyers, clients, former clients, personal friends and relatives."

4. Whether a state may adopt reasonable rules governing the conduct of lawyers in the area of advertising or whether there is to be one uniform rule throughout the states adopted by this court by judicial fiat permitting lawyers to advertise as they wish providing it is not false, misleading or deceptive with no other guide line as to what will fall within those categories.

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STATEMENT OF THE CASE

The Missouri Bar Advisory Committee adopts by reference the Statement of the Case as contained in Appellant's brief.

SUMMARY OF THE ARGUMENT

1. The State has a legitimate interest in protecting the public from advertising by lawyers which might mislead or deceive the public while at the same time assuring that there is a sufficiently free flow of information to the public which will enable the public to make an intelligent decision in the selection of a

lawyer. Although lawyer advertising under Bates v. Arizona, 433 U.S. 350 (1977) is speech protected by the First Amendment, it is commercial speech which is not accorded the same protection as other types of speech and is subject to reasonable regulation by the States in order to protect the State's interest. [Bates, *supra* and Ohralik v. Ohio, 436 U.S. 447 (1978)] DR2-101 Rule 4 of the Missouri Supreme Court in restricting the routine legal services and areas of practice which a lawyer may advertise is designed to and does prevent deception, is reasonable and is not more extensive than is necessary to serve the State's interest in protecting the public and regulating the conduct of lawyers. No case emanating from this Court holds to the contrary.

2. A lawyer has no constitutional right to list the courts in which he is admitted to practice in his advertisements. To the general public it can be deceptive for a lawyer to list the courts in which he practices, for example, the Supreme Court, as did Appellant in this case, since it would lead the layman to believe that he must have some qualification not possessed by other lawyers not admitted there. Such information in no way aids the public in making an intelligent selection of a lawyer or in knowing the availability and prices of routine legal services which was the objective sought in Bates v. Arizona, *supra*. We, also, find it unreasonable to categorize the practice of law as interstate commerce but even if it is, Bigelow v. Virginia, 421 U.S. 809 (1975) is not controlling because not remotely similar to the facts of this case. This rule, if affecting interstate commerce, does so only indirectly and in furtherance of a legitimate State objective.

3. DR2-102(A)(2) Rule 4 of the Missouri Supreme Court is not violative of Appellant's First Amendment rights in limiting the people to whom he can mail an advertisement. Bates, *supra*, held that there could be reasonable regulations as to the time, place and manner of legal advertising. This is a reasonable restriction preventing invasion of privacy which Ohralik, *supra*, held was, also, a legitimate State interest.

4. Recognizing that this Court is the ultimate arbiter in matters involving First Amendment rights the question finally becomes whether this Court is going to adopt a rule which will be applicable to all States requiring uniformity in lawyer advertising. If the rule is to be that advocated by Appellants, i.e. one proscribing only that which is false, misleading or deceptive, who is to make the determination? Have the States, particularly Missouri, not already done that in adopting rules such as DR2-101 and DR2-102 Rule 4? As long as the State's rules are reasonable and tend to further the objective of the free flow of information to the public concerning the availability and prices of routine legal services of lawyers, this Court should leave the matter of regulating the conduct of lawyers to the States and subject such rules to a low level of judicial scrutiny. A broad general rule is difficult of enforcement and has a chilling effect because reasonable people, including lawyers and judges, differ as to what is false, misleading or deceptive. Having established the basic ground rules in Bates, *supra,* Ohralik, *supra,* and In re Primus, 436 U.S. 412 (1977) the Court should now make it clear that reasonable rules regulating lawyer advertising such as the Missouri rule under consideration, admittedly one of the most restrictive and narrowly drawn, will not be held violative of First Amendment rights but a legitimate exercise of the State's right to regulate the conduct of lawyers within its borders where such control has traditionally lain.

ARGUMENT

I. DR 2-101 Rule 4 Of The Missouri Supreme Court Does Not Violate The First Amendment Right Of Free Speech By Restricting Lawyer Advertising Only To Those Routine Legal Services And Areas Of Practice Listed Therein.

When Bates v. Arizona, 433 U.S. 350 (1977) was handed down the Supreme Court of Missouri appointed a blue ribbon committee of outstanding Missouri lawyers to draft rules for submission to the Court governing the conduct of Missouri lawyers in conformance with that opinion. It had before it the two models suggested by the American Bar Association. From the two it chose basically Plan A (A27) with certain modifications. The committee did not agree with the American Bar Plan A which lists 25 categories of information which were considered appropriate in lawyers' advertisement in the printed media. It reduced that list to nine feeling that this was adequate to inform the public of the availability and prices of "routine legal services." The Missouri Supreme Court later increased this list to ten. The court's rule then authorized the advertising of such other services as might be approved by the Advisory Committee. Pursuant to this authority the Advisory Committee approved a list of twenty-three specific areas of law (See Rule DR2-101(A), and DR2-101(B), Rule 4, Supreme Court of Missouri (pages 2-6 of Appellant's brief). This Rule has since been amended to change "Tort Law" to "Negligence Law" and "Family Law" to "Domestic Relations Law."

This was a good faith effort on the part of the Missouri Court to comply with Bates and in our opinion accomplished the objective.

Traditionally, prior to Bates, it had been considered unethical for lawyers to advertise. Bates changed that traditional concept but the question remains in the minds of the Appellant and obviously some others how far this Court intended to go in lowering the bars on lawyer advertising when it rendered the Bates

decision. In the area of lawyer advertising the only cases emanating from this Court since Bates have been In re Primus, 436 U.S. 412 (1978) and Ohralik v. Ohio, 436 U.S. 447 (1978), neither of which dealt with the issue involved here. Following Bates all of the state Courts of necessity wrestled with the problem and modified their rules in some manner, some adopting Plan A, some Plan B of the American Bar and some with ideas of their own. We are informed that 30 states followed one of the American Bar Plans and 38 prohibit direct mailing such as that done by R____ M.J____ in this case. (The National Law Journal, Monday, June 15, 1981, p 14 *et seq.*) The point of this paragraph is that Missouri is not alone in construing Bates as it did, but was joined in its interpretation by a majority of the states.

The Court's admonition in Bates to those regulating lawyer advertising was that it may not be subjected to blanket suppression but could be regulated. (Bates, l.c. 381.) The Court went on at Page 384 to delineate some of the "clearly permissible limitations on advertising" not foreclosed by Bates. They included that which is false, misleading or deceptive but recognized that in the area of lawyer advertising, as distinguished from other commercial speech, because the public lacks sophistication concerning legal services, there might be restrictions not appropriate in other areas. In concluding the majority opinion the Court said that a State may not prevent publication in the newspaper "truthful advertisement concerning the availability and terms of routine legal services." (Bates l.c.384)

Appellants would now have the Court broaden that opinion further to say that the only restriction that the states can make on lawyer advertising is to prohibit that which is false, misleading or deceptive. He relies heavily on Central Hudson Gas and Electric Company v. New York Public Service Commission, 447 U.S. 557, 560 (1980) which had a statement that the Court must determine whether the regulation directly advances the governmental interest, and "whether it is not more extensive

than is necessary to serve that interest." In both Bates and Central Hudson the question was whether the State could completely suppress all advertising, consequently, the statement is of little value or guidance on the issue now before the Court.

The appellate courts of the various states and the lower federal courts have disagreed as to the proper interpretation to be placed on the Bates case making quotations from them lack persuasiveness but a review of the cases and the rules adopted by the courts demonstrates that eminent jurists and legal scholars have divergent views on the subject. For example, the Supreme Court of Tennessee in In re Petition For Rule of Court Governing Lawyer Advertising, 564 S.W.2d 638 (1978) concluded that any advertising of areas of law in which a lawyer practiced would be misleading until and unless specialization was adopted and, therefore, prohibited such advertising pending the adoption of such a rule. It declined to define what "routine legal services" were and, consequently, in effect continued to prohibit advertising in that area, also. The Federal District Court in Durham v. Brock, 498 F. Supp. 213 (M. D. Tenn. 1980) held this prohibition against advertising "routine legal services" violated first amendment rights under Bates. We agree.

Rhode Island also bars advertising of areas of practice but does permit the advertising of "routine legal services" which are expressly set out in the Court's provisional order. Carter v. Lovett and Linder, 425 A.2d 1244 (1981).

In New York the Supreme Court in The Matter of Alfred S. Koffler v. Joint Bar Association, 420 N.Y.S. 2d 560 (App. Div. 1979) held that direct mail solicitation by lawyers might be proscribed. The Court of Appeals In the Matter of Alfred S. Koffler v. Joint Bar Association 51 N.Y. 2d, 432 N.Y.S. 2d 872, 412 N.E. 2d 927 (1980) *Cert. den.* ____U.S.____, (1981) disagreed. The Appellate Division of the Supreme Court had this disciplinary rule before it again in The Matter of Zimmerman v. Office of Grievance Committees, 438 N.Y.S. 2d 400 (1981), this time with regard to advertising the areas of practice in which the

lawyer engaged. Mr. Zimmerman, who was a young lawyer, listed his name under all 23 areas, from Accident to Workmen's Compensation. In spite of the disclaimer the Court held that his lack of experience in many of the areas made such advertising deceptive.

It is notable that among these opinions there are dissents (including the decision in this case in the Missouri Supreme Court) and separate concurring opinions.

Other cases are cited by Appellant further reference to which would only lengthen this brief and serve no useful purpose except further to point out the divergent views and disagreement among the courts.

We can only approach this case from known quantities, those being the principles upon which this court has decided the three cases which have come before it on this general subject. We know from Bates the advertisement of legal services by lawyers is commercial speech protected to some extent by the First Amendment and cannot be proscribed but it can be regulated. We know from Ohralik that because of the commercial nature of the speech involved (Ohralik, *supra,* 426 U.S. l.c. 455-459) and the compelling interest which the States have in regulating lawyers (Ohralik, *supra,* 436 U.S. l.c. 460-462), the Court will subject rules restricting the speech of lawyers in advertising to a low level of judicial scrutiny (Ohralik, *supra,* 426 U. S. l.c. 457). We know from Bates that "the only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like x x x". (Bates, *supra,* 433 U.S. l.c. 372). We know that "there may be reasonable restrictions on the time, place, and manner of advertising." (Bates, *supra,* 433 U.S. l.c. 384). We know generally from Bates, Ohralik and Primus that the primary objective is not to protect the right of a lawyer to speak freely in hawking his wares but to make available to the public information concerning the availability, nature and prices of the services lawyers per-

form in order that it, the public, might make an intelligent selection of a lawyer. It seems that the Court has been rather careful to emphasize that it is talking about "routine legal services" and not the broad spectrum of the practice of law.

Applying these known quantities to the rule under consideration does it go beyond the permissible limits in restricting the Appellant's right of commercial free speech, or in the words of the Central Hudson Case, does it advance "the governmental interest asserted" and "is it not more extensive than is necessary to serve that interest?" Central Hudson Gas and Electric Company v. New York Public Service Commission, 447 U.S. 557, 560 (1980). Does it permit a sufficiently free flow of information to the public aiding the public in the intelligent selection of a lawyer while at the same time protecting the public from deception? We submit that it does meet all these tests.

The areas of law and the routine legal services permitted to be advertised under this rule are certainly adequate to advise the public of what is available and by whom in all common fields of practice. If there is one which is not listed, the Advisory Committee can be petitioned for an addition. We have seen that the Missouri Supreme Court has changed the nomenclature on at least two occasions. It is not written in concrete but is subject to modification upon a proper showing of the advisability of doing so.

Appellant argues that his nomenclature is as good as that of the Advisory Committee or the Court. That may well be but that seems to beg the question. Whether an area should be designated "Tort Law" instead of "Negligence" or "Family Law" instead of "Domestic Relations" is a matter of opinion. The question is whose opinion is to control. We submit that the opinion of the body charged with regulating conduct of lawyers should control, in this instance the Supreme Court acting through the Advisory Committee. It may be narrow in its application but it is certain, understandable and there should be

no difficulty in following it. Following it will not unduly limit the information flowing to the public for its benefit but serves to protect the public from the advertisement of ambiguous or questionable areas of practice not recognizable by the general public.

Since it is a State interest which is being protected this Court should give the State the right to do so, applying a "low level of judicial scrutiny" to rules such as this and invalidating them only if they clearly unduly restrict the flow of information which it is necessary for the public to have in order to be made aware of the availability and prices of routine legal services.

We submit that under the decisions of this Court the Rule of the Missouri Supreme Court regulating advertising by lawyers furthers the objective of Bates and is not violative of Appellant's First Amendment rights wherein it sets out a list of areas of practice and routine legal services which a lawyer may advertise to the exclusion of all others.

II. Appellant Has No Constitutional Right To List In Advertisements The Courts In Which He Is Admitted To Practice.

Appellant argues further that he has a right under the First Amendment to advertise to the general public that he is licensed to practice in various courts. In point II he again argues his right to list any area of law he pleases which we have covered in Point I. Again on this point the States have varied their approach to the problem. The following States apparently do not permit listing the courts in which the lawyer is admitted to practice: Alabama, California, Hawaii, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, North Dakota, Oklahoma, Rhode Island, South Dakota, Texas, Utah, Virginia and Wisconsin. The others do. The following States do not permit advertising a limitation of practice at all or restrict such advertising to the traditional areas of Patent, Trademark and Admiralty and areas of specialization where specialists are

authorized: Alabama, Alaska, Arkansas, California, Connecticutt, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa (may list 3 of 32 approved areas), Kansas (only 3 traditional areas), Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi (very restrictive), Montana, Nebraska, New Hampshire (gives format for limiting practice), New Jersey, New Mexico (not more than 3 areas of limitation), North Carolina (similar to Missouri), North Dakota, Ohio, Oklahoma (expressly prohibits advertising areas of limitation), Oregon (must contain disclaimer), Pennsylvania (same as Oregon), Rhode Island, South Carolina, South Dakota, Tennessee (only those approved by Court), Texas, Utah (Maximum of 5 out of 34 approved areas), Vermont, Virginia, Washington, West Virginia (may use only those approved by West Virginia State Bar and Supreme Court of Appeals) and Wisconsin.

If Respondent is correct in his position that the Bates case stands for the proposition that he may advertise any thing he wants to as long as it is truthful, not misleading or self-laudatory, the Bates case had been misconstrued by virtually every State Supreme Court in the nation.

Although, obviously, some courts see no harm in listing the courts in which the lawyer is admitted to practice, some, including Missouri, did not see fit to approve that as a permissible item of information. We should bear in mind throughout that the purpose of commercial advertising is "to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system", (Bates *supra*, 433 U.S. l.c. 364) "A rule allowing restrained advertising would be in accord with the bar's obligation to "facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." (Bates, *supra*, 433 U.S. l.c. 377)

Respondent in his advertisement stated that he was admitted to practice before the United States Supreme Court. In what

possible way could this facilitate the process of intelligent selection of an attorney? To how many prospective clients could this information possibly make a difference? Isn't this more in the nature of puffing, a self-laudatory statement, rather than information useful to the lay public in the selection of a lawyer? I dare say that only a small percentage of the lawyers practicing in Missouri have ever had or will ever have the occasion to be admitted to practice before the U.S. Supreme Court, but does that make them any less capable of handling matters that might come before them? We know that admission to practice before the U.S. Supreme Court is a perfunctory matter which most lawyers in the State could accomplish if they so desired. Yet, to the layman this could be quite misleading because it purports to give greater stature and appearance of expertise to the one so admitted over those who are not.

We submit that the Court's rule not permitting the listing of the courts in which the lawyer is admitted to practice in advertising disseminated to the general public is reasonable and designed to facilitate the intelligent selection of a lawyer. Such information in law lists distributed to other members of the profession can be helpful in referrals but can serve no useful purpose, only self-laudation, in advertising to the general public.

We submit that the prohibition of listing the courts in which the lawyer is licensed to practice is a reasonable one and not violative of Appellant's First Amendment rights.

III. The Part Of DR 2-102-(A) Rule 4 Of The Supreme Court Of Missouri Restricting The Persons To Whom Direct Mailing Can Be Made Is Valid And Not Violative Of Respondent's First Amendment Right Of Free Speech.

Count III of the Information before the Missouri Court charged Appellant with allowing professional accouncement cards, announcing the opening of his office to be mailed to persons other than lawyers, clients, former clients, personal friends

and relatives, contrary to DR 2-102(A) of Rule 4. The facts are as outlined in Appellant's statement of the case (p. 7 *et seq.* of Appellant's brief). Obviously, some of the persons to whom this announcement was sent do not fall into the categories set out in the rule. Respondent urges, however, that he has a constitutional right to send such an announcement to anyone he pleases.

We have no argument with the cases which distinguish between advertising and solicitation and agree that the announcement sent by Respondent is an advertisement, not solicitation. We disagree, however, with Respondent's conclusion that Bates or any other decision gives him an unqualified right to send such announcements to the public generally.

Respondent acknowledges that Bates said there could be regulation of "time, place and manner" of advertising. He argues that this regulation is unreasonable, that there is no difference between such information appearing in newspapers or telephone directories and being sent by mail. We submit that there is, indeed, a difference and that the regulation is reasonable.

We believe the difference between mail advertising and other recognized media, such as newspapers, etc. is well set out in the footnote on page 573 *et seq.* of In Matter of Koffler, 420 N.Y.S. 2d 560. We refer particulary to the portion which reads:

"A lawyer's letter commands immediate attention, if not fear. "Junk-mail" from others will often not even meet the respect of being opened; that will hardly ever happen to an envelope bearing indicia that it is from an attorney. It willy-nilly forces itself upon the attention of the recipient whose heart may momentarily flutter (knowing that the lawyer is not his own) until he finds out that nobody is making a legal claim against him. It is a much an intrusion into the privacy of the recipient's home and into his right to be left alone, as would be a taped telephone call from a previously unknown attorney advising of

his availability to perform stated legal services for stated prices, or an enforced personal solicitation by an attorney at his doorstep."

Throughout this footnote the word "advertisement" could well be substituted for the word "solicitation" and be applicable to this situation.

We are aware of the fact that the Court of Appeals of New York disagreed. We submit, however, that the Supreme Court decision is a better reasoned opinion.

Ohralik as well as Koffler recognized the invasion of privacy as an evil to be guarded against and a significant state interest justifying restriction on advertising.

Further in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 96 S. Ct. 1817, 1830, 48 L.Ed. 2d 346 it was held that the state may restrict the *manner* of advertising professional services provided that "restrictions of that kind x x x are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information".

This rule does allow for ample alternative channels of communication for the information which Respondent wishes to convey to the public. The vast majority of the states have the same restrictions on advertising by mail (Source: The National Law Journal, Monday, June 15, 1981, p. 14) as Missouri does. We submit that it is valid and does not violate Respondent's right of free speech.

IV. Although This Court Is The Final Arbiter Of First Amendment Rights, In Areas Of Doubt Concerning State Regulation Of Lawyer Advertising It Should Defer To The States And Leave The States In The Traditional Role Of Regulating The Conduct Of Lawyers In Their Boundaries.

As we have seen in the previous points the bar and judiciary of the various States are in disagreement as to what is necessary to regulate advertising by lawyers. This does not necessarily mean that any of them are wrong, just different. Perhaps we are all eventually saying the same thing, i.e. that lawyers may advertise anything that is not false, misleading or deceptive but our difference comes in determining what falls within these categories. The Missouri rule rigidly says that you may do certain things and no other. A great many other States do the same. Others such as New York decide on a subjective basis whether something is deceptive, etc. In Alabama a copy of the advertising material must be sent to the Grievance Committee within 3 days after its publication, then, ex post facto, the committee determines whether it is deceptive, etc. Foley v. Alabama State Bar 481 Fed. Supp. 1308 (D.C. N.D. Ala., 1979). This was held not be a prior restraint or otherwise violative of First Amendment rights.

These are different approaches to the problem but we believe not as satisfactory as knowing in advance what can and what cannot be done. The ex post facto determination surely would have a very chilling effect upon advertising not present under clearly drawn rules.

Because lawyer advertising is commercial speech entitled to some protection but not as much as other speech and considering the traditional role of the States in regulating the conduct of lawyers within their borders, we submit that this Court should subject rules such as DR2-101 and DR2-102 Rule 4 of the Missouri Supreme Court to "a low level of judicial scrutiny" and hold them violative of the First Amendment only if they clearly and unduly restrict the free flow of information to the public concerning the availability and prices of routine legal services thereby leaving the States in their traditional role of regulating lawyers.

CONCLUSION

The judgment of the Missouri Supreme Court should be affirmed and costs assessed against the Appellant.

Respectfully submitted,

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